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In the Supreme Court of the United States

No. 642

OCTOBER TERM, 1960.

ROBERT W. FREDIN,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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In the Supreme Court of the United States

No. _____.

OCTOBER TERM, 1960.

ROBERT W. FREDIN,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Petitioner prays that a Writ of Certiorari be issued to review the judgment and final order of the Supreme Court of the State of Ohio, in the case of *State of Ohio, Appellee vs. Robert W. Fredin, Appellant,* Number 36541, entered on the 21st day of September, 1960, and its refusal to reconsider said decision, entered on October 12, 1960.

OPINIONS BELOW.

The Journal Entry of the Court of Appeals of Cuyahoga County, Ohio is attached hereto as Appendix A. The Court of Appeals of Cuyahoga County, Ohio, affirmed the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, on Count No. 1 of the indictment and reversed entered final judgment for the defendant on Count No. 3 and Count No. 4 of the indictment.

The Journal Entry of the Supreme Court of Ohio affirming the judgment of the Court of Appeals against the defendant is part of the certified record of the Court below

that is filed in this Court. The Supreme Court of Ohio, affirmed the judgment of the Court of Appeals of Cuyahoga County, Ohio, on September 21, 1960, and is published in the Ohio Bar of October 10, 1960, and the Court's decision is found in *State of Ohio v. Fredin*, 171 O. S. 273.

The petitioner filed an application for rehearing in this matter on October 5, 1960, and the same was denied by the Supreme Court of Ohio, on October 12, 1960. See Ohio Bar Bulletin of October 17, 1960, at page 1075. These entries are also a part of the certified record of the Court below that is filed herewith.

JURISDICTION.

The judgment of the Supreme Court of Ohio was announced on September 21, 1960.

Rule XX, Section 1 of the Rules of Practice of the Supreme Court of Ohio, provides that no motion can be made for rehearing. Application for rehearing of any cause shall be made within fourteen (14) days of the announcement of the decision and shall be confined strictly to reasons for a rehearing.

Rule XX, Section 4, of the Rules of Practice of the Supreme Court of Ohio, pertinently provides:

> "One week after the announcement of the decision of any cause on the General Docket the Clerk shall issue a Mandate as provided by the entry of this Court; * * *, provided, that if the Clerk be notified, within one week after announcement of a decision on the * * * General Docket that application for a rehearing will be filed, such Mandate or certified copy of entry shall be held until such application be disposed of by the Court or the time for filing the same has expired and shall be then forthwith issued * * *."

A timely application for rehearing was filed. It was denied by the Supreme Court of Ohio on October 12, 1960.

From the final judgment of the Supreme Court of Ohio after the filing and denial of application for rehearing petitioner has no further appellate remedy under the laws of Ohio.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257 (3) and Amendments V, VI and XIV to the Constitution of the United States.

Section 1257 (3), 28 U. S. C. A., pertinently provides:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, * * * or where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * *."

Petitioner will be referred to as defendant or petitioner hereafter.

QUESTIONS PRESENTED.

Can it be said that the defendant herein had a fair and impartial trial under the due process clause of Amendments V, VI and XIV of the Constitution of the United States and Article I, Sections 10 and 16 of the Constitution of Ohio, where the record shows that:

1. The undisputed facts presented by the State of Ohio, conclusively show that the defendant herein who was indicted upon Count No. 1 for issuing a Bill of Lading to defraud under Revised Code, Section 4965.47 of the State of Ohio without disclosing the fact that the goods were not in the possession of the carrier or a connecting carrier, when the undisputed facts show that Exhibit 6c

upon which the defendant was indicted and tried was not a Bill of Lading but only a *memorandum*.

2. When Revised Code, Section 4965.09 of the State of Ohio, states that any alterations or additions made in a Bill are void and that the bill is enforceable only *according to its original tenor*, in this case as a *memorandum*?

3. When the defendant is indicted for negotiating, selling, transferring and delivering to Helen Herringshaw a Bill of Lading and the evidence conclusively shows, to-wit:

A. That the defendant herein had no dealings with Helen Herringshaw.

B. That Helen Herringshaw purchased accounts receivable from the Inter-Lakes Gulf Lumber Company through her attorney, Thomas A. Ryan, who acted as attorney and agent for Helen Herringshaw.

C. Ryan was also the attorney and agent of Inter-Lakes Gulf Lumber Company.

D. Ryan had knowledge of the dealings of the corporation as its attorney, agent, officer and director.

E. Knowledge to Ryan was as a matter of law, knowledge to Herringshaw and, therefore, was disclosure to Helen Herringshaw and no crime was committed.

F. That defendant made full disclosure in writing to Herringshaw in the Assignment and Warranty, State's Exhibit 6(a) and paragraph (b) as follows:

"(b) That full delivery of the merchandise evidenced by each of said accounts and bills of lading has been made in accordance with the specifications of the debtor who was the direct purchaser thereof."

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment V to the Constitution of the United States pertinently provides:

> "No person shall * * * be deprived of life, liberty or property without due process of law * * *."

Amendment VI to the Constitution of the United States pertinently provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *, and to have assistance of counsel for his defense."

Amendment XIV to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10 of the Constitution of the State of Ohio pertinently provides:

> "Except in cases of impeachment, * * *, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury. * * * In any trial, in any Court, the party accused shall be allowed to appear and defend in person and with counsel, * * * and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; * * *."

Article I, Section 16 of the Constitution of Ohio pertinently provides:

"All courts shall be open, and every person for an injury done him in his * * *, person or reputation, shall have justice administered without denial or delay."

STATUTES INVOLVED.

Revised Code, Section 4965.47 (8993-57):

"No person shall, with intent to defraud, negotiate or transfer for value a *bill*, knowing that any or all of the goods which, by the terms of such bill, appear to have been received for transportation by a carrier which issued the bill, are not in the possession or control of such carrier, or of a connecting carrier, *without disclosing this fact.*"

Revised Code, Section 4965.09 (8993-15):

"Any alteration, addition, or erasure in a bill after its issue, without authority from the carrier issuing the same, either in writing or noted on the bill, is void regardless of the nature and purpose of the change, and the bill is enforceable according to its original tenor."

THE INDICTMENT IN THIS CASE.

Of the term of April In the year of our Lord one thousand nine hundred and fifty eight.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO,

Do Find and Present, That Robert W. Fredin on or about the 7th day of August, 1957, at the County aforesaid, unlawfully, fraudulently and knowingly *did negotiate, sell, assign, transfer and deliver to Helen Herringshaw*, for value, a Bill of Lading, for a certain

Railroad Car of lumber, the purport and effect which by the terms of the Bill of Lading was that said Lumber of the value of $2,437.36 had been received for transportation by The Chicago South Shore and South Bend Railroad, the Carrier that issued the Bill of Lading, *and that full delivery had been made to the debtor and purchaser of said Lumber as evidenced by said assignment of said Bill of Lading.*

The said defendant, Robert W. Fredin with intent to defraud *knew and failed* to disclose to said Helen Harringshaw, that said *Lumber had not in fact been received for transportation by said Carrier, and that said Lumber was not in the possession or control* of any Carrier, *and that delivery of said Lumber had not been made to the debtor and purchaser as evidenced by the assignment of said Bill of Lading contrary* to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

STATEMENT OF THE CASE.

I. PROCEDURAL HISTORY OF THE CASE.

Robert W. Fredin was indicted by the Grand Jury of Cuyahoga County, Ohio, in the April Term of 1959, upon six counts.

Defendant was indicted under the Bill of Lading Law of Ohio, under Revised Code, Section 4965.47 as a first count and under Revised Code, Section 4965.48 as the second count.

Robert W. Fredin was further indicted under the Revised Code, Section 2913.01 on four counts of forging and uttering a forged instrument.

The trial court prior to empanelling a jury dismissed counts 5 and 6 of the indictment being counts of forgery and uttering a forged instrument.

At the close of the case of the State, the court dismissed Count No. 2 of the indictment under Revised Code, Section 4965.48 which was Count No. 2.

The Court submitted Count No. 1 under the Bill of Lading Law and Counts 3 and 4 under the forgery and uttering a forged instrument indictment to the jury and the jury found the defendant guilty on Counts Nos. 1, 3 and 4.

On appeal to the Court of Appeals of Cuyahoga County, Ohio, the Court of Appeals reversed the conviction upon Counts 3 and 4 of the indictment and discharged the defendant upon the same. See the Journal Entry of Court of Appeals, Appendix A.

Thereafter, Robert W. Fredin filed a motion to the Supreme Court of Ohio for a leave to appeal and to certify the record herein for final review which motions were denied and overruled by the Supreme Court of Ohio.

An application for rehearing was then filed in the Supreme Court of Ohio which was denied and overruled by the Court.

In the notice of appeal filed in the Supreme Court of Ohio, the defendant alleged that said appeal was based upon Constitutional Questions arising under the Constitution of the State of Ohio and of the United States of America, and that the defendant intended to file a motion for a leave to appeal.

On September 28, 1960, the motion of the defendant, Robert W. Fredin, to appeal as of right was dismissed by the Supreme Court of Ohio, and the Court at the same time dismissed the motion of the defendant, Robert W. Fredin to certify this case for final review. On October 10, 1960, the Supreme Court of Ohio denied the petitioner's application for rehearing. See Journal Entry of the Supreme Court of Ohio, Appendix B.

II. THE FACTS MATERIAL TO THE QUESTIONS PRESENTED.

Robert W. Fredin, petitioner, was president of the Inter-Lakes Gulf Lumber Company. The Inter-Lakes Gulf Lumber Company was in the wholesale lumber business located in Cleveland, Ohio (Record 375).

Lumber was purchased by the Inter-Lakes Gulf Lumber Co., and was sold to various lumber dealers. The lumber purchased by the Inter-Lakes Gulf Lumber Co. was financed by the corporation by selling accounts receivable to investors. The investors received as interest one per cent per month on the accounts receivable.

The account receivable purchased by an investor would be assigned to the investor (See Exhibit 6a, 6b and 6c). The investor would receive an assignment of the account receivable, together with an itemized account of the lumber sold and a memorandum attached to the same. See Exhibit 6a, 6b and 6c, attached to the bill of exceptions at page 1365.

An account receivable was sold by the Inter-Lakes Lumber Co. to Helen Herringshaw on August 7, 1957. See Exhibit 6a (R. 1365).

Mrs. Helen Herringshaw had no dealings with the defendant Fredin, pertaining to purchasing these accounts receivables. See Record 205-6-7. Thomas A. Ryan, her lawyer, acted as her agent and lawyer in all of these transactions. Ryan was also the lawyer for the corporation and had knowledge of these transactions.

Mr. Mathes, the agent for the railroad, testified for the State of Ohio and stated that Exhibit 6c, upon which defendant was indicted, was not a bill of *lading* but was a *memorandum*. See Volume 2, Page 540 of Bill of Exceptions.

We maintain that State's Exhibit 6c is not a bill of lading. It is nothing more than a *mutilated copy of a memorandum which is attached to an account receivable.* Since under the Ohio law any addition or changes or mutilations to a *bill of lading is void* and it reverts to its initial condition or tenor, the mutilated *memorandum remained a memorandum and could not and did not become a bill of lading.*

The defendant in this case was not indicted for *changing or forging a memorandum or palming it off as a bill of lading or attempting to make it a bill of lading.*

In this respect we must go to the record and see the testimony as presented by the State by looking at the testimony of Edward Mathes, called by the State. His testimony commences on page 529 of the Record. He was the agent for the railroad.

In Volume II, Page 540 of the Bill of Exceptions we find the following questions and answers of Mr. Mathes, to wit:

"Q. Now, I am showing you State's Exhibit 6c which is another bill of lading dated August 7, 1957—

The Court: State's Exhibit what?

Mr. McCurdy: State's Exhibit 6c.

Q. Will you tell us what that is?

A. *That is a memorandum.*

Q. Tell us, explain to us what that is?

A. It is the third sheet of a set.

Q. A set of what?

A. That bills of lading are printed on.

Q. All right.

A. And this is the memorandum copy which is merely an acknowledgment that a bill of lading was issued. *It is not a bill of lading, nor is it a copy or a duplicate of one.* It is merely, it states, it is merely for a matter of record or filing.

Q. Now there is something "Xed" out at the top, isn't there?

A. Yes, sir.

Q. What is under this X-ing out over there in the left hand corner?

A. The word "memorandum."

Q. Has something been substituted for that word?

A. The word "original."

Q. Who is the consignor on that?

(Page 541 of Record)

A. Inter-Lakes Gulf Lumber Co.

Q. And who is the consignee?

A. Monticello Lumber Company.

Q. That is your railroad.

A. Yes, sir. And N. K. P. is the Nickel Plate Railroad, or the New York, Chicago, and St. Louis is the full name."

Mr. Fredin further testified as follows (Record 1113).

"Q. Mr. Fredin, I just want to ask you a couple of questions and then we will conclude our examination.

Look at State's Exhibit 6c. In your opinion, and from your experience what is that, what does it represent?

A. It represents evidence of delivery to Monticello, this car, B & O 277906.

Q. Is that a bill of lading or not?

A. No, sir, it is not a bill of lading.

Q. What is it?

A. It is a copy made of a previously made exchange bill of lading, that was not in our hands.

The Court: You say it is an exchange bill of lading, is it?

The Witness: A copy of an exchange lading.

Q. Did you intend that State's Exhibit 6c, was that at any time intended to be a bill of lading?

Mr. McCurdy: Objection.

A. No, sir. Only the original one used the first time. This was to show evidence of delivery.

Q. Now handing you State's Exhibit 2c, is that the same as 6c?

A. Yes, sir.

Q. What was the intent, if any, at the time Exhibit 2c was used?

A. It was to show evidence of delivery of that car to Monticello Lumber Company.

Q. Was State's Exhibit 2c intended to be used as a bill of lading?

A. No, sir, it was not.

Q. What was it intended to be, then, if anything?

A. To show evidence of delivery, which it does show.

The Court: Evidence of delivery to Monticello Lumber Company?

The Witness: That they had received the car, yes, sir.

The Court: Is that what that says?

The Witness: That is what we were told to use them for by Mr. Ryan. He still had the original one. He still had kept the original one. He never gave it back to us. He always retained the original one. We never got them back."

From the above it is obvious that the State did not produce any evidence to substantiate the first count of the indictment.

Revised Code Section 4965.09 (8993-15) provides as follows:

"Any **alteration**, **addition**, or **erasure** in a bill after its issue, without authority from the carrier issuing the same, either in writing or noted on the bill, is void, regardless of the nature and purpose of the change, and the bill is enforceable according to its original tenure."

Also provision No. 10 at the back of State's Exhibit 6c has the following provision to wit:

"Section 10. *Any alteration, addition or erasure* in this bill of lading which shall be made without the special notation herein of the agent or the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenure."

Therefore, this leaves us in a position that first of all, the testimony is that *State's Exhibit 6c is not a bill of lading*, and secondly, *that if it was* mutilated or changed without the consent of the railroad or its agent, then, the alterations are null and void and of no effect and State's Exhibit 6c *still remained as a memorandum*

It is elementary that penal statutes must be strictly construed and construed in favor of the citizen or defendant. The above statutes must be read together. The one statute pertaining to the negotiation or transfer of a bill of lading relates to a bill of lading. *Nowhere* in that statute is there any reference to a mutilated or changed bill of lading, or a purported bill of lading.

The Evidence in this case is conclusive that Robert W Fredin had no business dealings with Helen Herringshaw

Helen Herringshaw testified as follows (R. 205-6-7)

"Q Mrs. Herringshaw, I gather from what you have told this jury and Judge Lybarger that you know nothing about these dealings with the Inter Lakes Lumber Company personally isn't that right?

A. That's right.

Q In other words, you dealt solely with Mr Ryan, is that right?

A. Correct,

Q He acted both as your lawyer and your agent, isn't that right?

A. That's right.

Q. You never had any dealings with Mr. Fredin, did you, Mrs. Herringshaw?

A. I met Mr. Fredin. I never dealt right with him.

Q. You never had any business dealings with him, did you, Mrs. Herringshaw?

A. No.

Q. So that insofar as you are concerned, businesswise, and your money is concerned, you are a complete stranger to Mr. Fredin, isn't that right?

A. Yes.

Q. This money that you turned over to Mr. Ryan, that was an arrangement that was entered into between you and Mr. Ryan, isn't that right?

A. Yes, sir.

Q. It was strictly an arrangement between you two people as you were the client and he was your lawyer, isn't that right?

A. That's right.

Q. So that Mr. Ryan acted as your lawyer, also, in these dealings, isn't that right?

A. That's right.

Q. At least you figured he was?

A. That's right.

Q. As far as this State's Exhibit 6-A is concerned, you never even knew it was in existence before you were showed this paper downstairs by one of the Assistant County Prosecutors, isn't that right?

A. As far as I know, that's right.

III. FEDERAL QUESTIONS RAISED BELOW IN THE TRIAL AND APPELLATE COURT.

A. The conviction on Count No. I should be set aside and held for naught for the reason that the evidence presented by the State of Ohio did not bring it within the strict terms of the bill of lading law, under which he was indicted, namely, Revised Code, Section 4965.47.

B. State's Exhibit 6c shows that it is a mutilated or changed copy of a memorandum changed by the Inter-Lakes Gulf Lumber Co., by obliterating the words *memorandum* and typing in the word *Original*. It remained nothing more than a *memorandum* because under the Law of Ohio, Revised Code, Section 4965.09, any such changes or mutilations are void unless they were made by the carrier or approved by the carrier.

C. The conviction herein cannot be a legal conviction because the evidence does not make out a crime under the strict wording of the statute under which the petitioner was indicted, namely Revised Code, Section 4965.47. His constitutional rights have been violated in that he has been deprived of life and liberty and the rights guaranteed by the United States Constitution under amendments V, VI and XIV and Article I, Sections 10 and 16 of the Constitution of Ohio, because said facts do not constitute an indictable offense or a crime.

D. If State's Exhibit 6(c) could conceivably be construed as a valid Bill of Lading, then the United States Interstate Commerce Commission would have to rewrite its Rules and Regulations as to Bills of Lading or the Railroads would be compelled to stop receiving freight if a *memorandum* or other paper is to be considered a Bill of Lading.

The assignments of error filed by petitioner in the Supreme Court of Ohio, as part of the certified record of the Court below, is being filed with this Court.

ARGUMENT.

I. Certiorari should be granted in this case because of the importance of the questions involved in this matter for the reason that the conviction herein is unfounded in fact and in law and is a denial of the petitioner herein of due process of law guaranteed under amendments V, VI and XIV of the Constitution of the United States of America, and Article I, Sections 10 and 16 of the Ohio Constitution.

A. NO CRIME HAS BEEN COMMITTED BY DEFENDANT.

In view of the fact that the admitted facts herein show that State's Exhibit 6c which was the document upon which the petitioner was indicted is not a Bill of Lading and is only a *memorandum*, the facts herein fail, as a matter of law, to sustain any valid indictment or valid conviction of the petitioner under the laws of Ohio. For that reason the petitioner should be discharged.

We submit that this cause should be certified to the Supreme Court of the United States as the conviction on Count No. 1 is contrary to law and should be set aside and defendant discharged.

It is the law generally and in the State of Ohio that criminal statutes must be *strictly construed*. In order to constitute a crime under a criminal statute the facts must come strictly within the words and meaning of the statute under which the defendant is charged. A conviction cannot be permitted on general principles or by stretching the meaning of a statute to cover things which are not specifically stated herein.

In Volume II, Page 540 of the Bill of Exceptions we find the following questions and answers of Mr. Mathes, agent for the railroad, to wit:

Q. Now, I am showing you State's Exhibit 6c which is another bill of lading dated August 7, 1957—

The Court: State's Exhibit what?

Mr. McCurdy: State's Exhibit 6c.

Q. Will you tell us what that is?

A. *That is a memorandum.*

Q. Tell us, explain to us what that is?

A. It is the third sheet of a set.

Q. A set of what?

A. That bills of lading are printed on.

Q. All right.

A. And this is the memorandum copy which is merely an acknowledgment that a bill of lading was issued. *It is not a bill of lading, nor is it a copy or a duplicate of one.* It is merely, it states, it is merely for a matter of record or filing.

Q. Now there is something 'Xed' out at the top, isn't there?

A. Yes, sir.

Q. What is under this Xing out over there in the left hand corner?

A. The word 'Memorandum.'

Q. Has something been substituted for that word?

A. The word 'original.'

Q. Who is the consignor on that?

(Page 541 of Record)

A. Inter-Lakes Gulf Lumber Co.

Q. And who is the consignee?

A. Monticello Lumber Company.

Q. That is your railroad.

A. Yes, sir. And N. K. P. is the Nickel Plate Railroad, or the New York, Chicago, and St. Louis is the full name.

In the case of *State v. Winterich*, 157 O. S. 414, 105 N. E. 2d 857 we find the following syllabus, to-wit:

> "4. A conviction of an alleged criminal offense cannot be predicated on general principles or mere suspicion, but must be predicated on positive evidence of every material element which is necessary to constitute the crime."

Judge Taft in his concurring opinion on page 862 states as follows, to-wit:

> "There are no common law crimes in Ohio. It follows that all crimes are statutory. Furthermore, it is well established that penal statutes must be strictly construed. See 12 *O. Juris.* 53, Sec. 12.
>
> * * *
>
> "In *State v. Meyers*, 56 O. S. 340, 47 N. E. 138, the first paragraph of the syllabus reads:
>
> "A statute defining a crime or offense cannot be extended by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute."

Therefore, a review of the evidence hereinabove set forth and a resume in this brief under the statement of facts will show that there was no evidence to justify the submission of Count No. 1 to the jury in this case. The judgment herein is contrary to law and should be reversed and the defendant acquitted and dismissed in this case.

B. HELEN HERRINGSHAW HAD NO DEALINGS WITH DEFENDANT.

We refer the Court to the positive testimony of Helen Herringshaw. She admits that she never had any dealings with the petitioner herein. Therefore, the charge herein is unfounded and the conviction herein is not founded upon any *legal basis of fact or law* and, therefore, this Court

should certify this matter for final review and discharge the defendant on Count No. 1 of the indictment.

The Evidence in this case is conclusive that Robert W. Fredin had no business dealings with Helen Herringshaw.

It can be seen therefore that the uncontradicted and undisputed testimony of Mrs. Helen Herringshaw is that she neither knew or dealt with the defendant in this case insofar as any investment or State's Exhibit 6a, 6b and 6c is concerned in this case. See full quotation in Statement of Facts.

It is elementary that the State of Ohio has the duty to prove each and every material ingredient of the offense as charged. In 15 *O. Juris.* 2d, Paragraph 597, page 764, we find the following, to wit:

> "It is the duty of the Court in a criminal case to instruct the jury that the burden of proof rests upon the State to prove each and every material ingredient of the offense charged, by that degree of proof required by law in such prosecution. Also, the code requires that in charging a jury the trial court shall state the meaning of the presumption of innocence. The jury should be told that the evidence must not only be consistent with the guilt of the accused but that it must also be inconsistent with his innocence, and if it is not so, it is the duty of the jury to give the accused the benefit of the doubt and return a verdict of not guilty. * * *"

On record 1077, Volume 3, the Bill of Exceptions, we find the following testimony of the defendant, Robert W. Fredin, pertaining to Helen Herringshaw, to wit:

> "Q. Now, let's come along to Helen Herringshaw. Do you know the lady?
>
> A. I've met her two or three times and that's all. Maybe twice.

Q Did you ever have any business dealings with Mrs. Helen Herringshaw?

A Never in my life, never. * * *.

(R. 1078)

Q Did you have any dealings with Mrs. Herringshaw personally pertaining to the use of State's Exhibit 6a, representing the account shown thereon?

A No, I never did. I told you. * * *

Q Did you at any time receive any money personally, for your own personal benefit, from the use of State's Exhibit 6a?

A No, sir. * * * (R. 1079)

Q Did you personally derive benefits of any kind from the use of State's Exhibit A?

A Personally?

Q Yes.

A No, sir.

Q Did you know that Helen Herringshaw was one of the people that was investing in the company?

A Certainly. I co-signed notes for her, for the company. Certainly, I knew.

Q And for how long a period did you know that she was an investor in the Inter-Lakes Gulf Lumber Company?

A I imagine two or three years.

Q During the transactions, any transactions that Mrs. Helen Herringshaw made with your company, did you at any time have anything to do with any of them?

A No, sir.

Q Did you at any time during any of these transactions take any money personally from Mrs. Helen Herringshaw?

A Never in my life."

By the above testimony it is obvious that the charge made by the State was not proven and the State itself introduced no evidence to substantiate the charge. Therefore, the verdict on Count No. 1 was not sustained by law.

C. THOMAS A. RYAN WAS THE ATTORNEY AND AGENT FOR HELEN HERRINGSHAW

The record in this case shows beyond any doubt that Mrs. Helen Herringshaw had no dealings with the petitioner. Thomas A. Ryan was her lawyer and agent who bought the accounts receivables for her.

Mrs. Helen Herringshaw unequivocally testified that she was an investor and that she got notes for her investments. That Tom Ryan handled all of her dealings and he was her Agent. Tom Ryan definitely stated in his testimony that he knew that he was buying accounts receivables for his clients and that Schedule 6A, 6B, and 6C was a Schedule that he had prepared the initial form to be used for the sale of accounts receivables. Under the circumstances of this case, the defendant could not be found guilty of negotiating or transferring a Bill of Lading to Helen Herringshaw in this case.

Mr. Ryan testified as follows (R. 719):

"Q. You are familiar with our records that you kept about Mrs. Herringshaw's account, are you not, Mr. Ryan?

A. Yes.

Q. You know that your secretary, Miss Mele, she has a running account going back to the first account receivable that you purchased, isn't that right, you have seen that?

A. Yes. * * *

(R. 720):

Q. But the question is, this State Exhibit 6a was kept by you in your office, was it not?

A. That's right.

Q. Mrs. Herringshaw never saw this, did she?

A. I don't know if she did or not. She would come in and ask for what the situation was or a report on the doings. Whether she seen this or not it

was finally turned over to her, or Mr. Prentke might have kept it out for some reason before she got her files."

D. THOMAS RYAN HANDLED AND HAD FULL KNOWLEDGE OF ALL THESE SALES OF THIS ACCOUNT RECEIVABLE.

On October 16, 1956, Inter Lakes Gulf Lumber Co. sold a carload of lumber to Monticello Lumber Co., being Car No. B & O 277906 which was delivered on November 7, 1956 (R. 376-377). Inter Lakes Gulf Lumber invoiced Monticello for this lumber and then sold and repurchased this account receivable as follows:

(1) To Dr. William H. Bragg on October 16, 1956 which account receivable was repurchased by Inter Lakes Gulf Lumber Co. in May, 1957.

(2) Inter Lakes Gulf Lumber Co. then on May 23, 1957, sold the same account receivable to Edwin Prentke (R. 380) and on August 1, 1957, Inter Lakes repurchased the account from Prentke. (State's Exhibit 2 (a), (b), (c).)

(3) Inter Lakes Gulf Lumber Co. then on August 7, 1957, sold the same account receivable to Helen Herringshaw. (State's Exhibit 6 (a), (b), (c).) It was on this sale to Helen Herringshaw that the defendant was indicted.

On all of these transactions the same procedure was followed, namely, Ryan received the papers for his clients, Bragg, Prentke and Herringshaw. The first sale to Bragg was accompanied by the original exchange bill of lading. The other two sales to Prentke and Herringshaw were accompanied by copies of the original exchange bill of lading, as the original bill of lading was kept in Ryan's file along with the other papers in Dr. Bragg's file.

The Herringshaw sale was accompanied by an assignment and warranty. (State's Exhibit 6 (a).) In this exhibit, the following paragraph appears:

> "In further consideration of the advancement made by the second party, first party does hereby represent, guarantee, warrant to and contract with the second party as follows:
>
> "(b) That full delivery of the merchandise evidence by each of said accounts and bills of lading has been made in accordance with the specifications of the debtor who was the direct purchaser thereof."

Defendant has been convicted of a violation of Ohio Revised Code Section 4965.47 which prohibits the transfer of a bill of lading knowing that the goods are not in possession of the carrier without telling the transferer about such fact.

State's Exhibit 6 A shows that the defendant transferred State's Exhibit 6 C to the agent of Helen Herringshaw, but it also clearly shows that the defendant, in writing, advised such agent that the goods had been fully delivered to Monticello Lumber Co., the debtor who was the purchaser of the lumber.

In view of the introduction and acceptance into evidence of State's Exhibit 6 A, the State has proven the innocence of the defendant. It, in essence, proves all of paragraph three of the indictment except the words "unlawfully and fraudulently" and "bill of lading." It thoroughly disproves the last paragraph of the indictment. The defendant should have been discharged in the trial court.

Thomas A. Ryan performed a dual role in this case. He not only was the agent and lawyer for the investors but he was also the agent and lawyer for the Inter-Lakes Gulf Lumber Company.

It is elementary that notice to an agent is notice to the principal and, therefore, these facts being known to the agent, it was knowledge to the principal. Therefore, how can it be said regardless of what type of investment was being made for Mrs. Helen Herringshaw, or others, *the fact remains that Tom Ryan, her agent, knew all about these things and, therefore, it was his duty to disclose them to his clients and if he failed to do so, that was a breach of duty on the part of Thomas A. Ryan and not Fredin or the Inter-Lakes Gulf Lumber Company. Nowhere in this long record is there any evidence that Fredin or anybody else asked or induced or even intimated to Mr. Thomas A. Ryan not to disclose the true facts or to withhold any information from any of his clients and investors including Mrs. Helen Herringshaw.*

In 2 *Ohio Juris.* 2d, page 170, Paragraph 112 states that an agent must be loyal to his trust and in paragraph 114 further states that an agent dealing with his principal in regard to the subject of the agency has a duty to communicate to his principal all material facts in connection with the transaction of which he has notice. In other words, it is his duty to inform his principal of all facts relating to the subject matter and of the agency that would affect the principal's interest. See also *Fulton vs. Nutt* (C. P.), 2 Ohio Opinions 77.

Therefore, since Ryan was the agent of Dr. Bragg, Prentke and Mrs. Helen Herringshaw and, having handled and had notice of all three transactions pertaining to the same account and knowing that each was a sale and a resale of the same account receivable, *his knowledge of all these facts was notice to the investor, Mrs. Helen Herringshaw, and, therefore, there cannot be a violation under the circumstances under the statute as charged.*

CONCLUSION.

We submit that the judgment and conviction herein on Count No. One be set aside, vacated and held for naught and final judgment be granted to the defendant on said count for the reason that there is no evidence to sustain a conviction beyond a reasonable doubt.

We further submit that the defendant did not have a fair and impartial trial and his constitutional rights and prerogatives were denied the defendant in the trial of this cause which were prejudicial to the rights of the defendant.

We request that final judgment be entered herein for the defendant on Count No. One or, in the alternative, a new trial be granted to the defendant herein.

Respectfully submitted,

N. A. BRINSKY,

Counsel for Petitioner.

PAUL MANCINO & VINCENT C. FORNES,

Of Counsel.

APPENDIX A.

Journal Entry of the Court of Appeals.

No. 24,892.

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT.

STATE OF OHIO,

Plaintiff,

vs.

ROBERT W. FREDIN,

Defendant.

JOURNAL ENTRY.

March 18, 1960.

This cause came on for hearing on the appeal of the defendant heretofore perfected to this Court upon questions of law, from the verdict of guilty and judgment rendered thereon in the Court of Common Pleas of Cuyahoga County, Ohio, upon Section 4965.47, Revised Code, being count number one of the indictment, and Section 2913.01, Revised Code, and two counts for forging and altering and publishing a forged instrument, being counts numbers three and four of the indictment.

This cause was heard by this Court upon the original papers, docket, and journal entries, and transcript as certified from the Court of Common Pleas to this Court, together with the Bill of Exceptions as certified to this Court, the briefs filed by the defendant and the plaintiff, and upon the oral arguments had in this Court by counsel for the State and counsel for the defendant.

Upon consideration thereof, the Court finds and orders that the judgment of conviction on count one of the in-

dictment in violating Sections 4965.47, Revised Code of Ohio, as charged in the first count of the indictment is hereby affirmed by the Court. The Court hereby finds and certifies that a reading of the Bill of Exceptions discloses an abundance of evidence to sustain said verdict and conviction and in the opinion of this Court, no error affirmatively appears on the record which prejudiced any substantial right of the defendant. The Court has considered all the assignments of error charged by the defendant and argued by the defendant.

The Court finds and it is the judgment of this Court that the finding and judgment of guilty upon the charge of forgery and uttering and publishing a forged instrument as charged in the third and fourth count, respectively, of the indictment, under Revised Code 2913.01, is hereby reversed, vacated and set aside and held for naught and final judgment is hereby rendered in favor of the defendant-appellant, with respect to said charges of forgery and uttering and publishing a forged instrument as charged in the third and fourth counts, respectively, of the indictment, for the reason that the record presents no evidence whatever that Robert A. Herman or the Continental Bank as charged in the indictment, were intended to be or were actually defrauded by the acts of the defendant. It is, therefore, ordered, adjudged, and decreed that the defendant be and is hereby discharged upon the third and fourth counts of the indictment, under Revised Code Section 2913.01 and judgment is hereby rendered for the defendant upon said third and fourth count, of the indictment, and the defendant is hereby ordered discharged upon said third and fourth counts.

The Court further finds that the appeal to this Court on the first charge of the indictment under Revised Code, Section 4965.47, was based upon reasonable grounds.

The Court further orders that the case be returned to the trial court for apportionment of costs.

Exceptions to the defendant and to the plaintiff.

/s/ JOY SETH HURD,

Presiding Judge

(Received for filing March 18, 1960.)

APPENDIX B.

Orders of the Supreme Court of the State of Ohio.

September 21, 1960:

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $

ORDERED, That a special mandate be sent the Court of Common Pleas of Cuyahoga County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."

* * * * *

September 21, 1960:

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 61

ROBERT W. FREDIN,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio.
GERTRUDE B. MAHON,
Assistant Prosecuting Attorney.
Criminal Courts Building,
Cleveland 14, Ohio,
Attorneys for Respondent.

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Statutes Cited.

Ohio Revised Code:	
Sec. 4965.09	5, 6
Sec. 4965.47	2, 3, 5, 10
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No.

ROBERT W. FREDIN,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OBJECTIONS TO JURISDICTION.

This case presents no substantial federal question which would require the intervention of this Court. The claims set forth at page 15 of the petition, and in the argument beginning at page 16, purported to be "federal questions" raised in the trial and on appeal in the State courts, are matters pertaining to the weight and sufficiency of the evidence, not constitutional questions. And, on the evidence establishing the petitioner's guilt of the crime of which he was convicted, the Court of Appeals of Cuyahoga County, Ohio, said (Pet. p. 27):

> "The Court hereby finds and certifies that a reading of the Bill of Exceptions discloses an abundance of evidence to sustain said verdict and conviction and in the opinion of this Court, no error affirmatively appears on the record which prejudiced any substantial right of the defendant."

The trial of this petitioner and the review of his conviction was in accordance with the laws of the State of

Ohio, the State and Federal Constitutions and the applicable decisions of this Court.

HISTORY OF THE CASE.

On August 1, 1958, Robert W. Fredin, the petitioner, was indicted by the Grand Jury of Cuyahoga County, Ohio on six counts. The first count charged the petitioner with a violation of R. C. Sec. 4965.47 and read:

> "* * * Do Find and Present, That Robert W. Fredin on or about the 7th day of August 1957, at the County aforesaid, unlawfully, fraudulently and knowingly did negotiate, sell, assign, transfer and deliver to Helen Harringshaw, for value, a Bill of Lading, for a certain Railroad Car of lumber, the purport and effect which by the terms of the Bill of Lading was that said lumber of the value of $2437.36 had been received for transportation by The Chicago South Shore and South Bend Railroad, the Carrier that issued the Bill of Lading, and that full delivery had been made to the debtor and purchaser of said Lumber as evidenced by said assignment of said Bill of Lading.
>
> The said defendant, Robert W. Fredin, with intent to defraud knew and failed to disclose to said Helen Harringshaw that said Lumber had not in fact been received for transportation by said Carrier, and that said Lumber was not in the possession or control of any Carrier, and that delivery of said Lumber had not been made to the debtor and purchaser as evidenced by the assignment of said Bill of Lading. * * *"

The second count, under R. C. Sec. 4965.48, was nolled during the course of the trial. The third and fourth counts charged the forgery and uttering of a check drawn on the special account of the Inter Lakes-Gulf Lumber Company, Inc., dated August 14, 1957, payable to Robert A. Herman, in the amount of $517.11, bearing the authorized signatures of Robert A. Herman (who had the

title of Treasurer), and Robert W. Fredin, and endorsed "Robert A. Herman." Counts five and six, which also involved forgery and uttering, were nolled at the request of the prosecutor before trial commenced.

The petitioner was tried to a jury, the trial lasting from March 10 to March 20, 1959. The jury found the petitioner guilty as charged in counts one, three and four, those being all that remained for their consideration. He was sentenced to the Ohio State Penitentiary, the sentences on all counts to run concurrently.

The petitioner appealed to the Court of Appeals of Cuyahoga County, Ohio, which affirmed the judgment with respect to the verdict of guilty as charged in the first count of the indictment, and reversed and rendered final judgment for the petitioner with respect to forgery and uttering and publishing a forged instrument as charged in the third and fourth counts of the indictment.

On September 21, 1960, the Supreme Court of Ohio dismissed the appeal on the ground that there was no debatable constitutional question involved and overruled a motion for leave to appeal. On October 10, 1960, the Supreme Court denied the petitioner's application for rehearing.

THE STATUTE.

The statute of the State of Ohio under which the first count of the indictment was brought is R. C. Sec. 4965.47, entitled, "Negotiation of bill for value for goods not in possession." It provides:

> "No person shall, with intent to defraud, negotiate or transfer for value a bill, knowing that any or all of the goods which, by the terms of such bill, appear to have been received for transportation by the carrier which issued the bill, are not in the possession or con-

trol of such carrier, or of a connecting carrier, without disclosing this fact."

FACTS.

The Inter Lakes-Gulf Lumber Company, Inc., was an Ohio corporation engaged in the business of lumber brokerage, with offices in Cleveland, Ohio. The petitioner, Robert W. Fredin, organized this company and was its president. One Robert Herman was treasurer. The corporation bought lumber from West Coast firms for cash and resold it to wholesale and retail lumber dealers throughout the country on a 30-60-90 day period time-payment basis. In order to have working capital while its money was tied up, the company would sell its accounts receivable to various investors, among whom were Edwin Prentke and Helen Herringshaw.

The testimony disclosed that one of these accounts receivable, in which the Monticello Lumber Co. was the consignee of the lumber, was sold to Edwin Prentke (R. 356-362), the date being approximately May 23, 1957; that the account receivable was evidenced by a schedule, an invoice and a bill of lading (marked State's Exhibit 2-A, 2-B and 2-C and attached to page 1361 of the record), which are part of the evidence; and that Prentke received full payment on this account (R. 360). The owner of the Monticello Lumber Co., Frank Zoro, testified that he had received this carload of lumber November 7, 1956 (R. 476) and that he paid for the lumber in March 1957 (R. 376-77).

The evidence disclosed further that prior to the above described transaction and many times thereafter the petitioner had secured from a railroad agent, pads of blank bills of lading signed by the railroad agent (R. 65-66). Then, on August 7, 1957, the petitioner sold this same account receivable to Helen Herringshaw (as evidenced by

State's Exhibits 6-A, 6-B and 6-C, attached to page 1365 of the record) through her attorney, Thomas A. Ryan, without disclosing to Ryan or to Mrs. Herringshaw that the carload of lumber represented on the bill of lading, State's Exhibit 6-C, was not then in transit nor in the possession of the railroad purported to have issued said bill of lading or of any connecting carrier, as prescribed by R. C. Sec. 4965.47 (R. 673, 260-1).

Invoice No. 5810 (State's Ex. 6-B) listed on the August 7, 1957 assignment to Mrs. Herringshaw, purported to cover a carload of lumber in transit in car B&O 277906 consigned to the Monticello Lumber Co. Accompanying the invoice was a bill of lading form (State's Exhibit 6-C), signed by the railroad agent, covering a carload of lumber in B&O car No. 277906. Actually, this was the same carload described in the account receivable which had been sold to Mr. Prentke the preceding May 23rd, which in fact had been delivered to the consignee the preceding November and paid for in March, 1957. Examination of this bill of lading shows that certain words, notably "Memorandum," have been X'd out and the word "ORIGINAL" typed in.

ARGUMENT.

REASONS FOR NOT GRANTING THE WRIT.

A. The Petitioner Was Proven Guilty of a Crime.

The petitioner argues at pages 9-14 and 16-18 of the petition that no crime was committed by him since the instrument (State's Exhibit 6-C) that he used to defraud the victim Helen Herringshaw was not a bill of lading but rather, "a mutilated copy of a memorandum" (Pet. p. 10).

In support of the general claim that the conviction on the first count is not supported by any evidence, the petitioner relies on R. C. Sec. 4965.09, which makes null

and void any alteration, addition or erasure in a bill of lading after its issue without authority from the carrier issuing the same.

It is the contention of the State of Ohio that State's Exhibit 6-C in its original form was merely a memorandum copy and not a bill of lading and hence not within the provisions of R. C. Sec. 4965.09, but that the alterations, deletions and additions testified to at page 540, Vol. 2 of the record, in fact changed this memorandum copy into the bill of lading that was the basis for the fraud. It is the position of the State that when the word "memorandum" together with certain other printed matter was X'd out by typewriter and the word "ORIGINAL" inserted on State's Exhibit 6-C above the signature of the railroad agent, this form then became to all intents and purposes an original bill of lading and was so intended to be used by the petitioner.

B. The Petitioner Had Business Dealings with Helen Herringshaw.

The petitioner claims that the record shows that he at no time negotiated or transferred a bill of lading to Helen Herringshaw and that the evidence in this case is conclusive that he had no business dealings with Helen Herringshaw. In support of this contention, he has set forth at pages 19-20 of his petition, excerpts from the transcript which purport to show that there was no direct business contact between the petitioner and Mrs. Herringshaw.

The record is replete, however, with testimony that Thomas Ryan was the agent of Mrs. Herringshaw; that he had the authority to act as her agent in business dealings with the Inter Lakes-Gulf Lumber Co., and that the petitioner was well aware of these facts (R. 186-87). At R.

668 we find the following in the examination of Thomas A. Ryan:

> "Q. (by Mr. McCurdy) Will you tell us whether there were some business dealings between Mrs. Herringshaw and Inter Lakes-Gulf Lumber Company?
>
> A. Yes. Mrs. Herringshaw, she loaned the Inter Lakes Lumber Company $40,000.
>
> Q. And what were the arrangements?
>
> A. The arrangements were that she wanted to be sure of a monthly income, so she took $30,000 to buy accounts receivable, and she loaned the other $10,000 where each month she would be paid a hundred dollars interest on that, what they call an open account.
>
> * * *
>
> Q. To whom did she loan this $10,000?
>
> A. To the Inter Lakes-Gulf Lumber Company."

State's Exhibits 5 and 5-A attached to page 1364 of the record are photostatic copies of the face and back of a check, No. 225, for $2,412.98, signed by Helen L. Herringshaw as maker and made payable to Inter Lakes-Gulf Lumber Co., Inc. in payment for the account receivable evidenced by State's Exhibits 6-A, 6-B and 6-C.

Mary A. Mele testified that she had been Mr. Ryan's secretary since 1948 and that she kept a record of the transactions between Mrs. Herringshaw and the Inter Lakes-Gulf Lumber Co. She stated that the account receivable was paid for by the check above described (R. 247-248).

The record discloses, as shown by State's Exhibit 6-A attached to page 1365, that the assignment and warranty of the schedule of accounts given to Helen Herringshaw by Inter Lakes-Gulf Lumber Co. as evidence of an account receivable was signed by the petitioner, R. W. Fredin. Thus, there is no question of the fact that Mrs. Herringshaw was directly investing in this company through Thomas Ryan and that the petitioner knew that she was.

C. Thomas A. Ryan Was the Attorney and Agent for Helen Herringshaw.

The petitioner continues to argue under the foregoing heading, beginning at p. 21 of his petition, that Helen Herringshaw had no dealings with the petitioner; that Thomas A. Ryan was her lawyer and agent who bought the accounts receivable for her.

It is the position of the State that there was a *transfer* of the bill of lading from the Inter Lakes-Gulf Lumber Co. to Helen Herringshaw, and that such transfer was fraudulent, as the indictment charges, because it was not disclosed that the goods which appeared to have been received for transportation by the carrier were not in the possession or control of such carrier, or of a connecting carrier.

At R. 1148, the petitioner admitted selling the same account receivable to Dr. Bragg, to Mr. Prentke, and then on August 7, 1957 to Mrs. Herringshaw. At R. 367-77 the testimony shows that the Monticello Lumber Co. had paid for the lumber in March 1957. The petitioner admitted also (R. 1147) that he knew this account receivable was to have been sold to Mrs. Herringshaw. His admissions, however, do not change the fact that he also made a fraudulent transfer of the bill of lading, State's Ex. 6-C.

D. The Guilt of the Petitioner Cannot Be Imputed to Thomas Ryan.

It is argued by the petitioner at p. 24 of the petition that Tom Ryan knew all about "these things" and, therefore, it was his duty to disclose them to his clients and if he failed to do so, that was a breach of duty on the part of Thomas A. Ryan and not Fredin or the Inter Lakes-Gulf Lumber Company.

It is quite true that Mr. Ryan was familiar with the fact that accounts receivable were being sold by the Inter Lakes-Gulf Lumber Co. There is nothing wrong or illegal about business transactions of this kind. The petitioner, however, imputes to Ryan knowledge of the fraudulent nature and character of the sale of these particular accounts receivable simply because they passed across the desk of Mr. Ryan. The evidence fails to support his contention; in fact, it shows that Mr. Ryan was never informed of the fact that this alleged carload of lumber had not been delivered to the railroad and was not in the possession of the railroad or a connecting carrier (R. 673-4).

Not only does the evidence fail to support this contention of the petitioner, it shows the opposite, for we find on examination and comparison of State's Exhibits 2-A, 2-B and 2-C with 6-A, 6-B and 6-C, both of which represent the same account receivable, that the first group differs from the second in that the schedules are different, bear different schedule numbers and name different assignees. The invoice numbers are not the same, the date has been changed, the amount of the invoice has been changed. Moreover, we find differences in what purports to be a bill of lading in each group. The only identical items are the description of the lumber and the number of the railroad car supposedly transporting such lumber.

It is apparent, therefore, that even with extraordinary diligence it would have been impossible for Mr. Ryan to have discovered that the same account receivable was being sold to more than one purchaser.

The petitioner claims at p. 23 that evidence presented by the State (State's Exhibit 6-A) has proven the innocence of the petitioner since it shows that he represented to the agent that the carload of lumber had been fully de-

livered to Monticello Lumber Co., the debtor who was the purchaser of the lumber.

If the carload of lumber had been delivered by the carrier to the consignee but had not been paid for, and constituted a valid account receivable, evidenced in part by the original bill of lading, there would be some merit to the argument of the petitioner. That, however, was not the situation in this case. The record discloses (R. 476) that the carload of lumber had been delivered to the Monticello Lumber Company months before, on November 7, 1956, and was paid for in March, 1957 (R. 376-77); that on May 23, 1957 this same account receivable was fraudulently sold to Edwin Prentke (R. 367-68); then on August 7, 1957 the petitioner again sold the same account receivable to Helen Herringshaw, as evidenced by State's Exhibits 6-A, 6-B and 6-C attached to page 1365 of the record, through her attorney, Thomas A. Ryan, without disclosing to either Ryan or Mrs. Herringshaw that the lumber in B & O car No. 277906 was not in transit but had been delivered and paid for months previously and was no longer an account receivable.

In such a situation, the goods certainly cannot be said to be in the possession or control of any carrier so as to place the individual transferring the bill of lading outside the mandatory provisions of R. C. Sec. 4965.47. To hold otherwise would open the door to similar fraudulent transactions, using bills of lading for goods long since delivered, as the basis for such fraud.

CONCLUSION.

In view of all of the foregoing, there is no merit to the claim that the petitioner did not have a fair and impartial trial. Nor is there any merit to the claim that his constitutional rights were denied to him on the trial of this case. We submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,
GERTRUDE B. MAHON,
Assistant Prosecuting Attorney,
Attorneys for Respondent.